

APPEAL NO. 010666

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 8, 2001. The hearing officer resolved the disputed issue by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fifth quarter. The claimant appealed and the carrier did not file a response.

DECISION

The hearing officer's decision is affirmed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Rule 130.102(b) provides that an injured employee who has an impairment rating (IR) of 15% or greater, and who has not commuted any impairment income benefits (IIBs), is entitled to SIBs if, during the qualifying period, the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury; and (2) has made a good faith effort to obtain employment commensurate with the employee's ability to work.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. Rule 130.102(e) provides, in part, that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts.

The claimant testified that he injured his left shoulder, neck, back, and right knee at work on _____, and that he had right knee surgery in 1998. The parties stipulated that on _____, the claimant sustained a compensable injury; that the claimant reached maximum medical improvement on February 12, 1999, with a 15% IR; that the claimant did not commute IIBs; that the qualifying period for the fifth quarter was from September 10, 2000, through December 9, 2000; and that the claimant had no earnings during the qualifying period. There is no appeal of the hearing officer's finding that the claimant's unemployment during the qualifying period was a direct result of the claimant's impairment. The SIBs criterion in dispute is whether the claimant attempted in good faith to obtain employment commensurate with his ability to work during the qualifying period. Section 408.142(a)(4); Rule 130.102(b)(2). The claimant contends that he was unable to perform any work during the qualifying period.

The claimant's treating doctor, Dr. J, wrote in October and November 2000 that the claimant is unable to work because of his injuries and that the claimant should have a knee replacement when his health is better. Dr. S reported in July 2000 that the claimant is unable to work and that a total knee replacement should be considered. According to a report of a functional capacity evaluation done in March 2000, the claimant is able to work at a sedentary physical demand level for an eight-hour day. Dr. K examined the claimant in March 2001 and reported that the claimant would be capable of working in various sedentary-type jobs if he can get up and down and change positions. The claimant did not document any job searches during the first seven weeks of the qualifying period.

The hearing officer found that the claimant had some ability to work throughout the qualifying period and that the claimant failed to make a good faith effort to seek employment commensurate with his ability to work during the first seven weeks of the qualifying period. The hearing officer determined that the claimant is not entitled to SIBs for the fifth quarter. The 1989 Act makes the hearing officer the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer's decision is supported by sufficient evidence and it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Michael B. McShane
Appeals Judge